UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JAMES LENNEN, Plantiff, v. JOHN EPPLER MACHINE WORKS INC., Defendant.	:	CIVIL ACTION NO. 97-2830

MEMORANDUM

KELLY, R.F. SEPTEMBER 5,1997

Presently before this Court is Defendant's Motion to Disqualify Plantiff's Counsel for Violation of Rule 4.2 of the Pennsylvania Rules of Professional Conduct and for production of all notes and memoranda relating to the contact giving rise to the violation. Defendant alleges, and Plantiff's counsel admits, making an ex parte telephone call to Helen Schnabl, an officer of John Eppler Machine Works ("Defendant"). Such conduct clearly violates Rule 4.2 yet disqualification is not warranted, therefore, Defendant's Motion is denied. For the reasons that follow, however, Plaintiff's Counsel will be precluded from using any evidence obtained during that phone call at trial.

I. BACKGROUND.

On June 13, 1995, James Lennen ("Lennen"), a sixty year old man, was terminated from his position as a Chief Engineer with John Eppler Machine Works Inc. ("Defendant"). Three days earlier, Lennen had requested approval to leave work one-half hour early each day to receive radiation therapy. Lennen

believed his termination resulted from his request and his age and sought the advice of an attorney.

On July 13, 1995 Lennen met with Thomas Earle of the Disabilities Law Project to discuss his termination.[1] On July 27, 1995, Lennen executed a retainer agreement with Mr. Earle. Mr. Earle admits making three telephone calls to Helen Schnabl on Lennen's behalf. Twice Ms. Schnabl was unavailable and did not return Mr. Earle's message. On August 15, 1995, Mr. Earle successfully contacted Ms. Schnabl.

It is at this point that the narratives of the parties significantly diverge.

Mr. Earle admits making all three phone calls to Ms. Schnabl as part of his "routine pre-filing investigation." Mr. Earle contends the final call lasted only five to six minutes and that he first informed Ms. Schnabl that he was an attorney representing James Lennen.

Two substantive questions were admittedly asked by Mr. Earle during this phone call. First, Mr. Earle asked Ms. Schnabl to confirm June 15, 1995 as the date of Lennen's termination. Ms. Schnabl did so. Second, Mr. Earle asked the reason for Lennen's termination. Ms. Schnabl allegedly stated that Lennen

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[1] Lennen also met with Lisa M. Rau of Kairys, Rudovsky, Epstein, Messing & Rau. Rau, along with Mr. Earle, represented Lennen before the Equal Employment Oppurtunity Commission. Because Rau does not represent Lennen in the present action, she cannot be disqualified.

Edward J. Carreiro Jr. does represent Lennen in this action and although he had no involvement in Mr. Earle's impropriety, as counsel of record, he is also subject to this Court's Order.

was terminated due to a insufficient work load and for errors made on past assignments. Mr. Earle then asked if "Defendant had any attorney which handled Defendant's legal affairs." Ms. Schnabl gave Mr. Earle the name, address, and phone number of Mr. George O'Connell, Defendant's counsel of record. At this point, according to Mr. Earle, the conversation ended.

To the contrary, Defendant alleges Ms. Schnabl told Mr. Earle that Defendant was represented by Mr. O'Connell at the outset of the call, yet Mr. Earle continued to question her. Defendant characterizes the August 15, 1995 call as an "interrogation" that lasted over one-half hour.

The substance of the phone call was also significantly more detailed in Defendant's point of view. Allegedly, the topics discussed included Lennen's termination and the reasons underlying it, Lennen's performance on the job and job evaluation, Defendant's workforce and workload as well as the existence of any replacement employees.

Defendant has failed to provide the Court with sufficient evidence to support its interpretation of the August 15, 1995 phone call. Defendant requests a hearing and oral argument, presumably to allow Ms. Schnabl to testify as to her version of the phone call. This is unnecessary, however, because Mr. Earle's admissions alone, as set forth above, clearly constitute a violation of Rule 4.2.

II. STANDARD.

Disqualification is within the District Court's

discretion, but should only be exercised after determining, on the facts of the particular case, "that disqualification is an appropriate means of enforcing the applicable disciplinary rule" which meets "the ends that the disciplinary rule is designed to serve." United States v. Miller, 624 F.2d 1198, 1201 (3d Cir. 1980). The court should also consider "any countervailing policies, such as permitting a litigant to retain the counsel of his choice and enabling attorneys to practice without excessive restriction." Id. "The party seeking to disqualify opposing counsel bears the burden of clearly showing that continued representation would be impermissible." Inorganic Coatings Inc. v. Galberg, 926 F. Supp. 517, 518-19 (E.D. Pa. 1995)(quoting Cohen v. Oasin, 844 F. Supp. 1065, 1067 (E.D. Pa. 1994)(citations omitted)).

III. DISCUSSION.

The United States District Court for the Eastern District of Pennsylvania has adopted and enforces the Rules of Professional Conduct adopted by the Supreme Court of Pennsylvania. LOC. R. CIV. PRO. 83.6 SUB-RULE IV. Defendant, alleging a violation of Rule 4.2 of the Pennsylvania Rules of Professional Conduct, seeks to disqualify Plaintiff's counsel. Rule 4.2, entitled "Communication with Persons Represented by Counsel," provides:

> In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

More importantly for purposes of this case, the Official Comment to Rule 4.2 provides:

> "In the case of an organization, this Rule prohibits communications by a lawyer for one party concerning the matter in representation with persons having a managerial responsibility on behalf of the organization, and with any other person whose act or omission in connection with that matter may be imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization."

Without question, Mr. Earle violated Rule 4.2 by communicating with Ms. Schnabl ex parte. Defendant's memorandum designates Ms. Schnabl as its "officer" or "General Manager." Lennen characterizes Ms. Schnabl as an "employee" in his response to the Defendants motion, contrary to his complaint filed with the Equal Employment Opportunity Commission, where she is designated as an "owner". Under any of these designations, Ms. Schnabl fits directly within the Comment to Rule 4.2. See University Patents, Inc. v. Kligman, 737 F. Supp. 325, 328 (E.D. Pa. 1990). Ms. Schnabl has "managerial responsibility on behalf of the organization" and her statements "may constitute an admission on the part of the organization." Rules of Prof. Conduct, Rule 4.2 cmt., 42 Pa.C.S.A. Mr. Earle should not have contacted her without first informing the Defendant's attorney. Cagguila v. Wyeth Labs., Inc., 127 F.R.D. 653, 654 n.2 (E.D. Pa. 1989).

Although Mr. Earle violated Rule 4.2, disqualification is not warranted. The purpose of Rule 4.2, to prevent overreaching by opposing counsel, would not be served by Mr. Earle's disqualification at this time. Inorganic Coatings, 926

F. Supp. at 519 (quoting University Patents, 737 F. Supp. at 327). Further, disqualification would hamper Lennen's right to retain the attorney of his choice. Brennan v. Independence Blue Cross, 949 F. Supp. 305, 310 (E.D. Pa. 1996)(noting a party's choice of counsel is entitled to substantial deference in the Eastern District of Pennsylvania). Thus, Mr. Earle will be permitted to continue as Lennen's chosen counsel.

Also of concern is Mr. Earle's use, at trial, of any information gained through this ex parte communication. Specifically, if evidence contrary to Mr. Earle's recollection of the phone conversation is offered, Mr. Earle may attempt to take the stand himself. Not only would this constitute a violation of Rule 3.7 of the Pennsylvania Rules of Professional Conduct,[2] but this would also allow Mr. Earle to benefit by violating the Rule of Professional Conduct. In an effort to avoid this result, Mr. Earle and his co-counsel are prohibited from using any information relating to the August 15, 1995 ex parte phone call between Ms. Schnabl and Mr. Earle at trial.[3]

An appropriate Order follows.

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[2] Rule 3.7 prohibits a lawyer from representing a client at a trial in which the lawyer is likely to be a necessary witness. Rules of Prof. Conduct, Rule 3.7, 42 Pa.C.S.A.

[3] Nothing in this opinion should be construed as preventing Plaintiff from offering the same evidence if gained from a source other than the ex parte phone call.

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ORDER

AND NOW, this 5th day of September, 1997, upon consideration of Defendant's Motion to Disqualify Plaintiff's Counsel and to compel the production of all notes and memoranda relating to the contact giving rise to the violation, and Plaintiff's response thereto, it is hereby ORDERED:

1. Defendant's Motion to disqualify Plaintiff's counsel is DENIED;

2. Defendant's Motion to compel production of all notes and memorandum relating to the contact is also DENIED;

IT IS FURTHER ORDERED that Plaintiff's counsel is prohibited from using any statement, information or evidence obtained through the ex parte communication with Ms. Schnabl during the trial of this action.

BY THE COURT:

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Robert F. Kelly J.